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CONFIRMATION OF TIM S. McCLAIN AS GENERAL COUNSEL FOR DEPARTMENT OF VETERANS AFFAIRS

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

APRIL 4, 2001

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C O N T E N T S

APRIL 4, 2001

Page

SENATORS

Craig, Hon. Larry E., prepared statement of 15

WITNESSES

McClain, Tim S., designee for nomination as General Counsel, Department of Veterans Affairs 2
Prepared statement of 3
Questionnaire for Presidential nominees 4
Response to written questions submitted by Hon. Larry E. Craig 6
Principi, Anthony J., Secretary, Department of Veterans Affairs 1

CONFIRMATION OF TIM S. McCLAIN AS GENERAL COUNSEL FOR DEPARTMENT OF VETERANS AFFAIRS

WEDNESDAY, APRIL 4, 2001

U.S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m. in room SR–418, Russell Senate Office Building, Hon. Arlen Specter (chairman of the committee) presiding.

Present: Senators Specter and Craig.

Chairman SPECTER. The Veterans' Affairs Committee of the U.S. Senate will now proceed with the confirmation hearing of Mr. Tim S. McClain to be the Veterans Administration General Counsel.

We are joined here by the distinguished Secretary of the Veterans Affairs Department, the Honorable Anthony Principi. I would like to introduce at the start Tim's mother and sister, but first his wife, Lynn McClain. Lynn, would you stand. And his mother, Mrs. Mary Jo McClain, and Tim's sister, Ms. Connie McClain. It is sometimes difficult to determine order of seniority. [Laughter.]

We have scheduled this hearing early to try to accommodate the Secretary. It is a little out of sequence, but I am going to try to get Mr. McClain confirmed before we adjourn because there is a real need for people to be put into place in the Administration. We really ought to be expediting the confirmations everywhere we can because the executive branch which is very, very short-handed. Of course, I do not know that this appointment really requires rapid confirmation because Tony Principi really does not need a lawyer. He would not do anything wrong—even without a lawyer.

But we welcome you here, Mr. McClain. I know that the Secretary has other commitments, so I will call on Secretary Principi first.

STATEMENT OF HON. ANTHONY J. PRINCIPI, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS

Mr. PRINCIPI. Thank you, Mr. Chairman. Thank you so very, very much for scheduling this hearing so quickly. I am deeply indebted to you.

Chairman SPECTER. You told me to when I saw you in Pittsburgh. [Laughter.]

Mr. PRINCIPI. I will continue to come back to Pittsburgh in Pennsylvania, wherever you want me, sir, over the next several months, and certainly to West Virginia as well.

Chairman SPECTER. Excuse me. Several years. [Laughter.]

Mr. PRINCIPI. Tim has strong Pennsylvania roots in Johnstown, so he will be there as well. But I do appreciate your doing this for us.

When I became Secretary of Veterans Affairs I knew that I would need a strong management team to work with me if I wanted to get anything accomplished. Mr. Chairman, today I am proud to introduce to you a man who, if confirmed, will be a key part of VA's team, and a man who will help me and help America to keep our Nation's promises to those who have served.

Tim McClain is a veteran himself. Like me, he is a graduate of the United States Naval Academy, and I know I will hear more about that as time goes on. And like me, he served in combat in Vietnam, and, like me, has spent much of his adult life in service to his country and is dedicated to ensuring that America's veterans are treated with the respect and honor that they have earned through their service.

I have known Tim personally for many, many years. I am very, very proud that the President allowed me to select him and that he nominated Tim to be General Counsel. I knew him as a fine officer when he was in the Navy, and as a fine lawyer in the 10-years since his retirement from service. I know he will tell me like it is.

Tim will be a strong addition to our Department. His considerable leadership and legal skills will be of great importance as we work to improve the service we provide. He will be a valued counsellor to me, to our Department, to this committee, and, above all, to our Nation's veterans.

I am extremely pleased that the President has nominated Tim for this important position. I am grateful to the committee for scheduling this hearing so promptly, and I hope you will see fit to act on his nomination as quickly as possible.

Mr. Chairman, and members of the committee who are not here, it is my pleasure and my privilege to introduce to you President Bush's nominee for the position of General Counsel of the Department of Veterans Affairs, my good friend, Mr. Tim McClain. Thank you, Mr. Chairman. I am going to testify over in the House this morning on information technology. So if you will excuse me, sir, I will go there.

Chairman SPECTER. Mr. Secretary, you may consider yourself not under subpoena. [Laughter.]

Mr. PRINCIPI. Thank you, sir.

Chairman SPECTER. Thank you for coming.

Welcome, Mr. McClain. Do you care to make an opening statement?

Mr. MCCLAIN. Yes, Mr. Chairman, I would.

STATEMENT OF TIM S. McCLAIN, DESIGNEE FOR NOMINATION AS GENERAL COUNSEL, DEPARTMENT OF VETERANS AFFAIRS

Mr. MCCLAIN. Mr. Chairman and other members of the committee, thank you for the invitation to appear before you today. I am humbled and honored by this nomination and the opportunity to testify at this hearing.

I believe that I possess a degree of experience that can, and will, be valuable to veterans if I am blessed with confirmation. Fol-

lowing graduation from high school, I entered the Naval Academy as a plebe in the Class of 1970. A little over 24 years later, I retired from active duty and became one of the millions of veterans who have proudly served this country. During my time on active duty I saw action in Vietnam as a Surface Warfare Office, attended law school, and joined the Navy JAG Corps, defended military members at courts-martial, adjudicated claims, advised senior officers on a myriad of legal issues, taught at the Naval Justice School, the Navy's Law School, and for 4 years presided as a Military Judge at courts-martial.

Upon retirement from active duty, I entered the private practice of law, specializing in defending medical professionals in malpractice cases. Several years ago I was employed as a management consultant, directing and supervising consulting projects in major U.S. companies at offices here and abroad.

Most recently, I have been a partner in a small private law firm specializing in health care, administrative, and military law.

I believe this breadth of experience allows me to bring certain skills to the General Counsel's Office. However, I realize that I have much to learn about the Department, its responsibilities, and the issues that concern the veterans we serve. I can assure you that I am fully committed to addressing those issues promptly and responsibly.

As General Counsel, my focus will be to act as counsellor and advisor-at-law to Secretary Principi and his new team, as he implements his vision for the future of the Department. I believe I already have a good working relationship with the Secretary. From our discussions, I know that many challenges lay ahead in the areas of veterans health care and adjudication of claims for veterans benefits. If I am confirmed, I intend to become fully conversant on these pressing issues and I will take a proactive, pro-veteran role in advising the Secretary, Deputy Secretary, and the Under Secretaries on the current law as it applies to these challenges.

If confirmed, I look forward to working closely with the members and staff of this committee in addressing the various issues so important to veterans. I also look forward to working with the various veteran service organizations. Their comments and concerns have spurred useful debate on many of the most difficult issues. I am certain that through a spirit of cooperation, we can discuss the issues and the proposed solutions in a manner that will ultimately benefit all veterans.

Mr. Chairman, this concludes my statement. I would be pleased to answer any questions that you might have.

[The prepared statement and biographical information of Mr. McClain follow:]

PREPARED STATEMENT OF TIM S. MCCLAIN, DESIGNEE FOR NOMINATION AS GENERAL COUNSEL, DEPARTMENT OF VETERANS AFFAIRS

Mr. Chairman, Senator Rockefeller and Members of the Committee:

Thank you for the invitation to appear before you today. I am humbled and honored by this nomination and the opportunity to testify at this hearing.

I believe that I possess a degree of experience that can, and will, be valuable to veterans if I am blessed with confirmation. Following graduation from high school, I entered the Naval Academy as a plebe with the Class of 1970. A little over twenty-four years later, I retired from active duty and became one of the millions of vet-

erans who have proudly served this country. During my time on active duty I saw action in Vietnam as a Surface Warfare Officer, attended law school and joined the Navy JAG Corps, defended military members at courts-martial, adjudicated claims, advised senior officers on a myriad of legal issues, taught at the Naval Justice School (the Navy's Law School), and for four years presided as a Military Judge at courts-martial.

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As General Counsel my focus will be to act as counselor and advisor-at-law to Secretary Principi, and his new team, as he implements his vision for the future of the Department. I believe I already have a good working relationship with the Secretary. From our discussions I know that many challenges lay ahead in the areas of veterans health care and adjudication of claims for veterans benefits. If I am confirmed, I intend to become fully conversant on these pressing issues and I will take a proactive/pro-veteran role in advising the Secretary, Deputy Secretary and Under Secretaries on the current law as it applies to these challenges.

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Mr. Chairman, this concludes my opening statement. I would be pleased to answer any questions from the Committee.

QUESTIONNAIRE FOR PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

1. Name: Tim S. McClain.
2. Address: 11745 Lake Grove Ct., San Diego, California 92131.
3. Position: General Counsel, Department of Veterans Affairs.
4. Date of Nomination: March 22, 2001.
5. Birth date: June 10, 1948.
6. Birth place: Johnstown, PA.
7. Marital status: Married.
8. Children, age: Scott E. McClain, 27; Brendan C. McClain, 24.
9. Education: Institution (city, state), dates attended, degrees received, dates of degrees.

California Western School of Law, San Diego, California; 8/75–5/78; Juris Doctor; May 1978.

U. S. Naval Academy, Annapolis, Maryland; 6/66–6/70; BS; June 1970.

10. Honors: List all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

U.S. Navy: Meritorious Service Medal (2 awards); Navy Commendation Medal (2 awards; 1st award with Combat "V"); Combat Action Ribbon; Navy Unit Commendation; Meritorious Unit Commendation; National Defense Medal; Vietnam Honor Medal (First Class); Vietnam Campaign Medal; Vietnam Service Medal.

11. Memberships: List all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable, and other organizations for the last 5 years and other prior memberships or offices you consider relevant.

California State Bar—Active Member 1978–Present

San Diego County Bar Association—Member, 1999–Present

Scripps Ranch Old Pros—Member—Community Athletic Organization, 1986–2000

12. Employment Record: List all employment (except military service) since your twenty-first birthday, including the title or description of job, name of employer, location of work and inclusive dates of employment.

7/90–8/96 Attorney Neil, Dymott, Perkins, Brown & Frank San Diego, CA
8/96–3/99 Management Consultant IMC, LTD Great Falls, VA
7/99–Present Partner PRINCIPI & McCLAIN, LLP La Jolla, CA
United States Senate Page

13. Military Service: List all military service (including reserve components and National Guard or Air National Guard), with inclusive dates of service, rank, permanent duty stations and units of assignment, titles, descriptions of assignments, and type of discharge.

3 June 1970—Commissioned Ensign, U.S. Navy
Aug–Dec 1970—Student, Communications Officer School, Newport RI
Dec 70–Jan 72—Communications Officer, USS Bausell (DD–845), Yokosuka, Japan
Jan 72–Apr 74—Communications Officer, Destroyer Squadron 15, Yokosuka, Japan
Apr 74–Aug 75—Instructor, Surface Warfare Officer School, Coronado, CA
Aug 75–July 78—Law Education Program (California Western School of Law), San Diego, CA
Aug 78–Nov 78—Student, Naval Justice School, Newport, RI
Dec 78–July 81—Attorney, Naval Legal Service Office, San Diego, CA
July 81–July 83—Staff Judge Advocate, NAS Miramar, San Diego, CA
July 83–July 86—Instructor, Naval Justice School, Newport, RI
Aug 86–July 90—Military Judge, Navy Marine Corps Trial Judiciary, San Diego, CA
Honorable Discharge on July 31, 1990. Retired with rank of Commander, JAG Corps, U.S. Navy

14. Government experience: List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments other than listed above: None.

15. Published writings: List titles, publishers, and dates of books, articles, reports or other published materials you have written. None.

16. Political affiliations and activities: (a) List all memberships and offices held in and financial contributions and services rendered to any political party or election committee during the last 10 years:

State Vice Chairman, California Veterans for Bush-Cheney 2000
$100 donation to Bush/Cheney Presidential Transition Foundation
$100 donation to Bush/Cheney Recount Fund II

(b) List all elective public offices for which you have been a candidate and the month and year of each election involved: None.

17. Future employment relationships: (a) State whether you will sever all connections with your present employer, business firm, association, or organization if you are confirmed by the Senate:

I intend to sever all connections with PRINCIPI & McCLAIN LLP if I am confirmed by the Senate. That law partnership will be dissolved if I am confirmed for the position.

(b) State whether you have any plans after completing Government service to resume employment, affiliation, or practice with your previous employer, business firm, association or organization:

Following completion of Government service, I have no plans to resume employment with PRINCIPI & McCLAIN, LLP.

(c) What commitments, if any, have been made to you for employment after you leave Federal service? None.

(d) (If appointed for a term of specified duration) Do you intend to serve the full term for which you have been appointed? Not applicable.

(e) (If appointed for indefinite period) Do you intend to serve until the next Presidential election? Yes.

18. Potential Conflicts of Interest: (a) Describe any financial arrangements, deferred compensation agreements, or other continuing financial, business, or professional dealings which you have with business associates, clients, or customers who will be affected by policies which you will influence in the position to which you have been nominated: None.

(b) List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated: None.

(c) Describe any business relationship, dealing, or financial transaction which you have had during the last 5 years, whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated: None.

(d) Describe any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any Federal legislation or for the purpose of affecting the administration and execution of Federal law or policy. None.

(e) Explain how you will resolve any potential conflicts of interest that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements involved.) No applicable.

19. Testifying before the Congress: (a) Do you agree to appear and testify before any duly constituted committee of the Congress upon the request of such committee? Yes.

(b) Do you agree to provide such information as is requested by such a committee? Yes.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LARRY E. CRAIG TO TIM S. MCCLAIN

Question 1. How are you planning on developing the Memorandum of Understanding between the Veterans Administration and the Department of Defense in order to provide medical services to TRICARE-dependent military retirees in the Veterans Medical Centers?

Answer. I am familiar with the Veterans Millennium Health Care and Benefits Act, at section 113, which requires the Secretary of Defense (DOD) and Secretary of Veterans Affairs (VA) to enter into such a Memorandum of Understanding. I understand that officials from VA and DOD have met several times regarding this requirement, but have been unable to reach an agreement to date. My office will continue to provide legal advice to those VA officials working directly with DOD to resolve these differences.

Question 2. How are you planning to reach out and ensure that all disabled veterans are adequately compensated for related service-connected disabilities, and receive high quality medical care?

Answer. I consider the role of the Office of General Counsel (OGC) to be that of an enabler of the Veterans Health Administration and Veterans Benefits Administration, the program elements that are directly responsible for the provision of health care and other benefits. The OGC can greatly facilitate the timely and accurate delivery of veterans benefits and services in a number of ways.

For example, as new benefit laws are enacted, it is OGC who must interpret them in order to ensure they are implemented as Congress intended. Implementation may also entail the development of new regulations, a process in which OGC is intimately involved. Need for further legal interpretation frequently arises during the course of program administration, as unique, and perhaps unforeseen, fact-patterns are encountered by claims reviewers. Some of these legal opinions are designated as precedents to be followed throughout the Department, contributing to the uniform application of the law by the fifty-eight VA Regional Offices and sixty-four members of the Board of Veterans Appeals.

Moreover, the advocacy of OGC attorneys before the Court of Appeals for Veterans Claims can greatly influence the developing case law that increasingly drives the claims process. This case law often requires OGC interpretation for the benefit of program officials. In addition, my office also plays a leading role in advocating the Secretary's legislative agenda for improving veterans' benefit programs.

All of the above are very important responsibilities that I intend to closely oversee throughout my tenure as General Counsel.

Question 3. How are you planning on implementing the Millennium Health Care Act?

Answer. The Office of General Counsel (OGC) has been involved in the Act's implementation in a number of ways, but none more important than in the development of new and amended VA regulations.

For example, the Act provides new authority for VA to reimburse for the costs of emergency medical care provided to veterans in non-VA facilities. My office has played a major role in devising proposed rules for implementing this authority. The regulations are currently undergoing OMB review as provided by Executive Order 12866.

The Act also:

- authorized the provision of expanded non-institutional and extended-care health services,
- authorized VA to amend the schedules of co-payments charged certain veterans for pharmaceuticals, long-term care and outpatient treatment: and,

• required VA to develop a new methodology for ranking applications for VA grants for state nursing-home construction.

The necessary rules and regulations for implementing the Act are in various stages of development or concurrence. My office will continue to monitor the progress of the implementation of these rules.

Chairman SPECTER. Before we proceed to questions and answers, I would like to administer the oath to you. If you would please rise and raise your hand. Do you solemnly swear that the responses to questions and your further testimony and the testimony already given is, and will be, the truth, the whole truth, and nothing but the truth, so help you God.

Mr. MCCLAIN. I do.

Chairman SPECTER. Thank you. Mr. McClain, you have a very close personal relationship with Mr. Principi, and that is, for the most part, good. But there is the potential that sometimes a relationship may be a little too close. What assurances can you give the committee that your advice will be objective and, notwithstanding your close personal relationship and friendship, if you have to give him bad news or if you have to give him advice that he does not like, that you will be tough about it?

Mr. MCCLAIN. Senator, thank you for that question. I know that it may look like a concern, but it should not be a concern to the committee.

Chairman SPECTER. You are not a good friend of his? [Laughter.]

Mr. MCCLAIN. Sir, I am a very good friend of Mr. Principi. But my position as counsellor will dictate exactly how I will act and advise the Secretary. As General Counsel of the Veterans Affairs Department, my responsibility is to lay out the good and the bad for the Secretary, to give him all of the options and to give my best advice on the interpretation of the law as it applies.

Chairman SPECTER. And your duties run to the Government and the Veterans Administration and not personally to the Secretary?

Mr. MCCLAIN. Well, certainly they run to the Administration, to the veterans, to the Government, and to the Secretary.

Chairman SPECTER. You are not his personal counsel?

Mr. MCCLAIN. No, I do not believe I am.

Chairman SPECTER. The adjudication backlog is of enormous proportion. Secretary Principi has made the reduction of that a top priority. Would you submit in writing to this committee—I do not want an off-the-cuff answer; we want a plan, something in writing—your plan for tackling that issue, because it is a mammoth issue. Is 30 days too long a period to give you to answer that?

Mr. MCCLAIN. No, Mr. Chairman, it is not.

Chairman SPECTER. Is 2 weeks too short a period to give you to answer that?

Mr. MCCLAIN. I could have an answer to you in 2 weeks, Mr. Chairman.

Chairman SPECTER. OK. We will take it in 2 weeks, then.

[The information referred to follows:]

In my short tenure at this department, I have discovered that this is a multi-faceted problem that will take an integrated solution. No one division or department within VA can tackle this problem alone.

I have met briefly with VBA Under Secretary Joseph Thompson and BVA Chairman E. Dane Clark to discuss the claims backlog problem in general. All departments are working deligently to find a solution. A very significant initiative is Secretary Principi's charter for a VA Claims Processing Advisory Task Force. The Task

Force formed a Claims Processing Advisory Committee, which had its first meeting on April 16–17, 2001, with direction to submit its initial findings within 120 days. Lawyers from the Office of General Counsel are providing legal advice to members of the Committee. My office anticipates that the Committee will make certain recommendations that, if approved and implemented by the Department, will require new and/or revised claims processing regulations. All parties will want the regulations to be drafted and implemented within a very short time frame. Therefore, I am studying the best way to restructure and the progress we are making in regulations division to meet this demand.

Chairman SPECTER. The Veterans Administration has over 400 attorneys on staff, and approximately one-half of these attorneys are situated at VA regional offices. How do you propose to administer this enormous legal staff since you do not have 400 attorneys to oversee in your current law firm? How many less than 400 do you have in your current law firm?

Mr. MCCLAIN. 399. [Laughter.]

There are two of us in the law firm.

Chairman SPECTER. So how are you going to do that, Mr. McClain?

Mr. MCCLAIN. Fortunately, Mr. Chairman, there is a very good and effective organization of career attorneys with the VA that is currently in place that they have a very good management structure at this point.

Chairman SPECTER. They do not need you to manage them?

Mr. MCCLAIN. No, they do. They need leadership at the top.

Chairman SPECTER. So how are you going to handle it?

Mr. MCCLAIN. Through close personal relations with—I plan to meet every one of the attorneys within a fairly short period of time.

Chairman SPECTER. How short a period of time?

Mr. MCCLAIN. As a matter of fact, we have got a training, a regional counsel training currently set up for August.

Chairman SPECTER. Is it possible to reduce the number of attorneys through attrition? You will head one of the biggest law firms in the country, Mr. McClain.

Mr. MCCLAIN. And I think that the size of the law firm is driven by the work that we are asked to do. One of the things that I will——

Chairman SPECTER. You cannot at this point have a handle on the work; it is too soon.

Mr. MCCLAIN. I do not.

Chairman SPECTER. Would you make an analysis for the committee as to management savings? I am not suggesting that you go in and fire people or wreck the crew. But when I became District Attorney of Philadelphia I found a lot of ways to economize and to better utilize my personnel. We have a very tight budget and, to the extent that we can allocate VA funds for health care, that is what this committee would like to do. So after you finish your report on the backlog, will you take another 2 weeks to 4 weeks to give me a report on this topic? Let me ask you, what do you think is a reasonable timeframe on the 400 attorneys issue?

Mr. MCCLAIN. Through my experience having done some of this in management consulting, this sort of analysis would take an intensive 3 months.

Chairman SPECTER. OK. You have got it.

Mr. MCCLAIN. Thank you very much.

Chairman SPECTER. So in 90 days we would like to know your evaluation on whether you can effect economies or reorganize your legal staff.

[The information referred to follows:]

July 2001

WHITE PAPER

EFFICIENCIES ACHIEVED BY THE OFFICE OF GENERAL COUNSEL (OGC), IN THE AREA OF PERSONNEL MANAGEMENT, DEPARTMENT OF VETERANS AFFAIRS (VA)

In 1995, OGC implemented VA's mandate to streamline its management and reduce the number of full time employees (FTE) by reducing the number of supervisors from 128 to 75, and by reducing the number of total employees from 730 to 663, over a 5-year period. OGC accomplished these goals by reducing the layers of management in its field locations throughout the country, reducing the number of managers in headquarters, and trimming the number of employees through attrition, buy-outs and early retirement.

OGC reduced the number of managers primarily through the restructuring of its field component. Prior to 1995, there was at least one District Counsel office in each of the 50 states and Puerto Rico. The new organization merged the District Counsel offices into 23 regions. The new Regional Counsels supervised more employees spread over a much greater geographic area than their predecessor District Counsels, resulting in the phased departure of 46 managers. This, combined with aggressive attrition efforts ultimately reduced the number of OGC's employees to 638 at the end of Fiscal Year (FY) 2000.

Primarily due to the increased numbers of appeals to the Court of Appeals for Veterans Claims, personnel law cases, loan guaranty and medical care cost recovery actions, OGC was left with no choice but to hire more staff during FY 2000, such that OGC's current staffing level is 687. That number includes 78 managers, 74 of whom are attorneys; 323 non-supervisory attorneys, 36 paralegals; 120 legal assistants; and 130 administrative personnel.

OGC represents the Secretary of Veterans Affairs in every appeal filed with the Court of Appeals for Veterans Claims (CAVC) Since 1988, when the Veterans Judicial Review Act established this Court, the number of appeals filed with the court rose from a low of 1303 in 1992, to a high of 3260 in FY 1999. OGC projects that veterans will file 3750 appeals in the current fiscal year, In 1992, Congress extended the Equal Access to Justice Act (EAJA) to CAVC appeals, thereby increasing the scope of OGC's litigation responsibilities. Every appeal filed by a represented veteran after November 1992 included the potential for EAJA litigation as well. Accordingly, this 35 percent increase in appeals required additional staff to provide representation for the Secretary. The appellate staff rose from 51 in 1992 to its current level of 92. Each of the 42 staff attorneys is currently responsible for approximately 38 appeals.

OGC attorneys in headquarters and in the field represent VA in an ever-increasing number of personnel law matters, including equal employment opportunity complaints, appeals to the Merit Systems Protection Board, unfair labor practice claims, arbitrations, and in grievance actions. Although OGC attorneys represent the Secretary primarily in administrative litigation, the nature of this litigation is now so complex and demanding that the preparation of these cases is comparable to judicial litigation. In FY 2000, OGC attorneys defended 4,627 cases, primarily in VA's field locations.

Despite the stable economy during the past several years, the number of foreclosures of VA-guaranteed loans has increased, resulting in approximately 15,000 such actions in FY 2000. VA attorneys and paralegals participate in the foreclosure processes, assist in the sale of foreclosed properties in VA's inventory, address a myriad of title issues that arise on these properties, evict reluctant tenants and craft mortgage releases and related documents. These actions are labor-intensive and, while OGC managers assign much of this work to paralegals, attorneys must provide active representation in local courts. The increased activity has required OGC to hire additional attorneys and paralegals.

OGC attorneys, paralegals and legal assistants have contributed significantly to the recovery of funds from insurers, worker's compensation funds and tortfeasors responsible for the cost of veterans' care through contract or injury. In FY 2000, OGC personnel collected almost $16 million in over 425,000 separate actions; during the first 7 months of FY 2001, OGC's efforts have resulted in collections of $9 million.

These funds are provided to the Veterans Health Administration to provide for medical care for veterans.

OGC attorneys represent the Secretary in numerous other areas as well. With the expansion of enhanced use programs and sharing agreements, OGC attorneys routinely review contracts and provide advice to VA officials concerning the structuring of novel business arrangements that allow for more robust use of VA facilities and provide additional dollars for veterans benefits and health care. The 687 OGC employees represented over 800 VA facilities in over 510,000 actions during FY 2001. These actions have the cumulative effect of increasing the number of dollars available to care for veterans, decreasing the Secretary's exposure to personnel and tort claim judgments, and otherwise facilitating the operation of the Department. The dedication and hard work of OGC's employees allow for this efficiency.

Chairman SPECTER. There is a question here on statutory interpretation. If I ask you the question, will you tell me that you are going to follow the intent of Congress and not make new law?

Mr. MCCLAIN. Absolutely.

Chairman SPECTER. I thought you would, so I thought I would abbreviate. [Laughter.]

I understand that you are experienced as a malpractice defense counsel. Has your experience as a malpractice defense counsel given you occasion to advise medical clients on the avoidance of malpractice claims?

Mr. MCCLAIN. Yes, Mr. Chairman, they have.

Chairman SPECTER. That is a unique talent, Mr. McClain. What I would like you to do is to give some thought to how you might counsel the doctors to avoid malpractice claims, because, in doing that, you will really be giving them advice on how to give better medical service.

Mr. MCCLAIN. The law firm that I was connected with was connected with the insurance companies that insure the medical professionals and we participated in their risk-management programs, including advising the doctors and giving them seminars on how best to avoid incidents of malpractice and how to chart the particular procedures.

Chairman SPECTER. Mr. McClain, down the road, say in 4 months, give us a written response as to what you found there.

Mr. MCCLAIN. I will.

[The information referred to follows:]

WHITE PAPER

PLAN TO ASSIST DEPARTMENT OF VETERANS AFFAIRS (VA) HEALTH CARE PROVIDERS IN AVOIDING MALPRACTICE CLAIMS BY IMPROVING THE QUALITY OF HEALTH CARE

The Office of General Counsel (OGC) works in close cooperation with the Veterans Health Administration (VHA) in various ways to assist in the quest for improving the quality of health care in VA medical facilities and thereby reduce and avoid patient injuries that may lead to medical malpractice claims.

Currently, OGC shares access to its computerized Tort Claim Information System (TCIS) with VHA for patient safety and quality assurance purposes. We also share with VHA our annual report setting out the number of claims filed, settled, and denied, and amounts paid.

When a medical malpractice claim is paid under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680, whether as an administrative claim, settlement by the United States Attorney, or court judgment, information is presented to the VHA Director of Medical Legal Affairs for consideration by an outside panel of medical reviewers to determine whether the health care providers involved should be reported to the National Practitioner Data Bank. VHA is updating its procedures for data bank reports, and recently published proposed regulations for that purpose.

OGC also participates in other ways with VHA to address the legal problems associated with providing health care to veterans. OGC personnel in Regional Counsels'

offices work closely with VA medical center officials in advising patients when errors that result in injury or harm to a patient are discovered. Patients are informed of the error and of their legal and administrative remedies.

Additionally, OGC collaborates with VHA by providing representatives to present topics for training programs such as the recent National Conference for Patient Safety and by participating in the American Association of Anesthesiologists closed claims study, sharing information on VA claims and litigation involving anesthesia.

Payment of every medical malpractice claim results in scrutiny of the appropriateness of medical care and treatment by one or more health care providers, through peer review at the local facility and through the outside panel of medical reviewers. These retrospective reviews provide useful information, but have a significant lag time from the date of the incident until resolution of the claim or litigation. OGC has worked very closely with Dr. Jim Bagian in the creation of the National Center for Patient Safety; an innovative program designed to improve the quality of care in VA. The Center is responsible for implementing a nationwide internal and external reporting system to supplement the existing accountability systems. The new system's sole purpose is to foster organizational learning to improve patient safety. It is designed to encourage reporting of medical errors—even close calls and potential problems—without assigning blame to the health care providers. The Center looks at problems and potential problems immediately after their occurrence. They examine the data received to discern common systemic problems, and methods to correct them, as well as to reduce the opportunity for human error. VA believes the Center will play a major role in improving patient safety and, in turn, reducing malpractice claims.

In addition to continuing these and similar activities, for reducing VA medical malpractice claims includes developing a presentation that will be available to health care providers to inform them of lessons learned from review of the medical malpractice claims over the last decade. Our presentation will include topics on creation and completeness of appropriate entries in the patient's medical records, necessity of ensuring that tests ordered are reviewed in a timely manner, requirement for correct and legible orders and prescriptions, appropriate supervision of residents and other trainees, and how to obtain and document informed consent. In short, the program's focus will be on reducing malpractice claims by improving the quality of VA health care. This program will be provided live, or over VA's satellite broadcast network. Details will be worked out in the next several months.

In summary, OGC has worked with VHA in its desire to improve patient safety and quality of care. We will provide additional programs to not only continue to improve care but to avoid malpractice claims in the future.

Chairman SPECTER. One of our jobs is oversight and the reality is we do not have the time—with all of our busy schedules—to do oversight as well as we should. But on these particular items, I think it would be very useful for the committee to have your insight. And then I would like you—on the three subjects which we have talked about today—to give us updates every 6 months as to how you are proceeding on the backlog, on the management of your attorneys, and on proactive work your attorneys can do to assist doctors in avoiding malpractice claims.

Mr. McClain, do you swear that all the answers you have given in the written questions are accurate?

Mr. MCCLAIN. Yes, I do.

Chairman SPECTER. Do you have any conflicts of interest which were not fully disclosed to the committee?

Mr. MCCLAIN. No, there are none.

Chairman SPECTER. Do you know of any other matter which if known to the committee might affect the committee's recommendation to the Senate with respect to your nomination?

Mr. MCCLAIN. No, sir, I do not.

Chairman SPECTER. Have you fully and accurately provided financial and other information requested by the committee?

Mr. MCCLAIN. Yes, I have.

Chairman SPECTER. And do you now affirm that information is complete, accurate, and provided in a form not designed to evade?

Mr. MCCLAIN. Yes.

Chairman SPECTER. Do you think that last question, prepared by Mr. Tuerk, the committee's counsel, was a good question? [Laughter.]

Could you improve upon it? I do not hear an answer to that. [Laughter.]

Now that you are caught, Mr. McClain, we will see whether your skills are sufficient to give an affirmative answer that you can improve on it, or whether you do not want to say something which would offend Mr. Tuerk?

Mr. MCCLAIN. That is probably it.

Chairman SPECTER. Or you don't want to say something which would offend the chairman. [Laughter.]

You do not have to comment further.

Do you agree to supply the committee such nonprivileged information, materials, and documents as may be requested by the committee in its oversight and legislative capacities for so long as you serve as General Counsel?

Mr. MCCLAIN. Yes, sir, I do.

Chairman SPECTER. Do you agree to appear before the committee at such times and on such matters as the committee shall request for as long as you serve as General Counsel?

Mr. MCCLAIN. Yes, sir.

Chairman SPECTER. Mr. McClain, I think you have got a very good background. I like your relationship with the Secretary. I like your background. I like the fact that you are from Johnstown. I like your wife, your mother, your sister. Your sister just gave you a thumbs up. Are you serious about that, Connie? Mr. McClain, do you think I should swear Connie before adjourning? [Laughter.]

I wanted to get this done fast. We could take a lot more time but I am due at a Judiciary Committee hearing at 10 o'clock. Our schedules are jammed. But I want to get you confirmed if I can and I am going to instruct the committee's counsel to see if we can convene the full committee in the President's Room after a vote today so we can act and try to get you confirmed before we adjourn on Friday.

Mr. MCCLAIN. Thank you, Mr. Chairman.

Chairman SPECTER. I would like you to stay because Senator Craig is on his way and he will be acting chairman to ask you additional questions.

Mr. MCCLAIN. Certainly.

Chairman SPECTER. Thank you very much, Mr. McClain. I think you will be confirmed and I wish you the very best in your service as General Counsel. And I will not ask you for a commitment that when your tour ends you will return to Johnstown as opposed to San Diego. [Laughter.]

Mr. MCCLAIN. Thank you.

Chairman SPECTER. Thank you all.

Senator CRAIG [presiding]. Tim, as this may be a first for you, it is also a first for me. This gentleman just referred to me as "Mr. Chairman." [Laughter.]

So to chair the Veterans' Affairs Committee is a brief but most important honor of mine. I have served on the committee a good number of years now. So, thank you.

Mr. MCCLAIN. It is my pleasure, sir.

Senator CRAIG. All right. I met the chairman in the hall and he said he had held the committee open so that I could visit with you for a few moments. I have looked at your resume, obviously. And what is most important is that the Secretary is the person who recommends you and feels comfortable that he can work with you to manage the Department and to deal with many of the problems it will face over the course of time that are part of the natural course of doing business. But, at the same time, you know and I know there are some very real challenges out there. So for the next few moments, why don't you give me an idea of what your thoughts are and your plans are coming into this capacity as General Counsel.

Mr. MCCLAIN. Senator, I would be glad to. I have been fortunate to be at the VA for the past 2 weeks getting briefs, and so I just have an orientation sort of knowledge on many of the issues. But I do understand that those major issues are adequate delivery of health care and another pressing issue is the claims backlog.

From the health care aspect, I know that Dr. Garthwaite is working very hard on it and we will give him whatever support from the General Counsel's Office he needs.

Probably the thing that the General Counsel can impact more than the current health care delivery is the claims adjudication status. There is a tremendous backlog from recent court decisions. The Secretary has announced that there will be a task force of industry leaders and CEO's from the insurance industry and other industries to review our process and then, hopefully, make a recommendation which would be a structure for us to begin implementing change in our process to bring efficiencies to the process.

Where the General Counsel can get involved is, No. 1, I think by advising that task force to the greatest extent possible on what the laws currently are so that we need to work within the framework that we have. But also then, after the Veterans Benefits Administration decides exactly how we are going to implement those recommendations, I am sure there will be regulations that need to be written, and the General Counsel's Office can assist directly in getting them written and getting them through in an expeditious manner. We would not be the bottleneck in this. We would be somewhat of an expediter to assist in getting these regulations through and getting the process fixed so that we can get the backlog down.

Senator CRAIG. How are you planning on developing the Memorandum of Understanding between the Veterans Administration and the Department of Defense in order to provide medical services to TRICARE-dependent military retirees in the Veterans Medical Centers?

Mr. MCCLAIN. Senator, I have not been fully briefed on that particular issue. I will take it upon myself to become knowledgeable and be fully briefed on it. I would be glad to get back to you with an answer to that either on the record or personally.

Senator CRAIG. That is important out in my State. TRICARE, in some States where there has been a resistance to an HMO style

health care delivery system, has left some of our military people and our military retirees wanting. So we are trying to resolve that. We have, obviously, a very capable and well-respected Veterans health care delivery system in Boise with the hospital there. It seems to be a right approach toward resolving that.

How are you planning to reach out and ensure that all disabled veterans are adequately compensated for related service-connected disabilities and receive the high quality medical care that they deserve and expect?

Mr. MCCLAIN. From the perspective of the General Counsel once again, we work closely with the Veterans Benefits Administration and we will continue to do so. We will assist them in interpreting the law, assist them in getting the regulations written, and assist them in evaluating from a legal aspect any of the particular issues that come up in this challenge of getting the benefit backlog taken care of.

But also there is another component to that of the people who currently would be applying for benefits; in other words, new claims. We want to ensure that the new claimants are not in the same situation as some of the old claimants, that they had to wait so long to find out if they were entitled to benefits. And one of our most pressing issues is going to be to bring the time for adjudication down to something reasonable and more in line with an industry standard.

Senator CRAIG. One of the concerns I have had in Idaho, and we are starting to resolve that by clinics and outreach approaches, in the ruralness of our State and the need to cover veterans, sometimes the drive from Salmon, ID, to Salt Lake City of 350 miles one way is not an easy route to go in the middle of the winter to get health care. We have a clinic now in Pocatello, about midway, and we now have a clinic in Twin Falls.

I guess what I am suggesting is that any time we can provide a more localized care opposed to a regional approach of service that we can reduce overall costs and we can provide more immediate service. I have talked with the Secretary about that. We are going to continue to work on that. We are making headway in those areas, Tim, and I think that is an important part of what we do. I now chair the Aging Committee here in the Senate and we are looking very closely at rural health care delivery and oftentimes the decline of rural infrastructures as the character and the economy of those regions change, and veterans are a part of that and we need to be sensitive to it.

How are you planning on implementing, or have you been briefed and do you understand the issue of the Millennium Health Care Act?

Mr. MCCLAIN. I have had an orientation on the Millennium Health Care Act, Senator. I certainly do not profess to have in-depth knowledge about it but I understand its main points.

Senator CRAIG. Well, that is one thing that we will be working very closely with you and the Administration on as we move into the implementation of that Act.

[The prepared statement of Senator Craig follows:]

PREPARED STATEMENT OF HON. LARRY E. CRAIG, U.S. SENATOR FROM IDAHO

Mr. Chairman, it is indeed a pleasure to be here at the confirmation hearing of Tim S. McClain for General Counsel, Department of Veterans Affairs (VA). The VA represents millions of men and women who have served our great nation, often at extreme sacrifice. Therefore, in gratitude it is important that we select a General Counsel who will ensure the just and faithful execution of the laws, regulations, and policies of the VA, and by so doing enable the Department to accomplish its mission of service to our Nation's veterans.

I am very impressed with Mr. McClain's qualifications for the post of General Counsel of the VA. A decorated Vietnam veteran, he has extensive experience working both as a military Staff Judge Advocate and in the private sector on adjudications and appeals. It is also important to me that he has worked with VA Secretary Principi before and has his trust. I am confident that Mr McClain will provide Secretary Principi with honest counsel on matters he is responsible for administering. I look forward to working with Mr. McClain on future benefit matters and assisting veterans' benefit claimants to a quick and fair determination. The claims benefit process is in dire need of reform and must be our top priority. In addition, we must continue to improve access to services which recent legislation has provided. As a fiscal conservative, I understand how difficult it is to insure optimum commitment to our nations's heroes while balancing the budget. I believe that Mr. McClain's breadth of knowledge will enable him to ensure our government honors its commitments to our veterans and implements the most beneficial and cost effective programs.

I look forward to working with Mr. McClain when addressing, expanding, and improving the delivery of services and benefits so that all veterans have equal access to, and quality of, medical care. In many areas of the country as in Idaho, the waiting lists are long and only getting longer. I would encourage the VA to continue exploring under serviced areas. Any time we can provide local—as opposed to regional—service, the veterans will be grateful and overall cost reduced. Of course, one of my major concerns is ensuring the necessary funding for primary care, but we must not forget to provide all the services and specialty care that many of our veterans require. The Millennium Health Care Act has had some major impacts; however, the VA has not yet developed the policies necessary to deal with issues such as emergency care, Hepatitis "C", and Diabetes. Mr. McClain's opinions in these matters will be critical to insuring we meet the needs of our Nation's veterans and their families today and tomorrow.

Veterans who are also military retirees are suffering greatly in Idaho as well as other rural areas. TRICARE, which was set up to provide medical services to active duty and retirees, is bad and getting worse in Idaho. I implore Mr. McClain to work with the Department of Defense (DOD) in developing procedures for providing medical services to TRICARE-dependent military retirees in VA facilities.

I believe that Mr. McClain is an excellent choice to help define our commitment to our nation's veterans, while recognizing the tough fiscal decisions that must be made. Let us never forget the important role that our veterans have made insuring our national security—the United States is a super power and enjoys such success because of the service and sacrifice of our veterans for whom we should be forever grateful.

Senator CRAIG. Well thank you very much for your time and your patience. Good luck. We know you will be successful through the process. We all have a sense of urgency here to supply the new Administration with the people they need to get on with the business of governing our country. So I am glad that the chairman could move this hearing along. I am quite sure that we will move you along as quickly as we can.

Mr. MCCLAIN. Thank you very much.

Senator CRAIG. Thank you.

The committee will stand adjourned.

[Whereupon, at 10:08 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

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